Supreme Court, U.S.
FILED

98 1725 APR 27 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ABDEL MOHAMMED RAHIM,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Fifth Supreme Judicial District of Texas

PETITION FOR A WRIT OF CERTIORARI

EDGAR A. MASON
Attorney for Petitioner
2612 Boll Street
Dallas, Texas 75204-1002
(214) 720-9050

152486

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

47W

QUESTIONS PRESENTED

I. Does the admission of a confession of a non-testifying co-defendant inculpating the accused and the declarant, pursuant to a state exception to the hearsay rule, violate the Sixth Amendment's confrontation clause, where the declarant repudiated the statement?

II. Did the Texas Court of Appeals err when it failed to decide whether in assessing the reliability of hearsay statements of an unavailable declarant, offered as a declaration against penal interest, the Sixth and Fourteenth Amendments do or do not prohibit consideration of corroborating evidence outside the circumstances surrounding the making of the statement?

III. Did the Texas Court of Appeals use an improper legal standard for evaluating whether evidence erroneously admitted was "harmless error"?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices viii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

The Testimony Of Barrios, Hardeman, DeJean And Vivanco 2

Summary of the Argument 5

Reasons for Granting the Writ 8

I. Admission Of Adolfo Vivanco's Post-Arrest Statements Violated Petitioner's Sixth Amendment Right To Confrontation Because A Post-Arrest Statement, Made By A Non-Testifying Accomplice In The Course Of Custodial Interrogation, Which Incriminates The Defendant And Which Is Both Repudiated And Impeached, Is Inherently Unreliable And Therefore Inadmissible. 8

Contents

		Page
A.	A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Inherently Unreliable And Its Admission At Trial Violates The Confrontation Clause.	11
B.	A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.	17
II.	The Texas Court of Appeals Used an Improper Legal Standard for Evaluating Whether Evidence Erroneously Admitted Was Harmless Error.	20
Conclusion		22

TABLE OF CITED AUTHORITIES

Page

Cases:

Bingham v. State, 913 S.W.2d 208 (Tex. Crim. App. 1995) 4, 6

Bingham v. State, __ S.W.2d __ (Tex. Crim. App. 1999) 1999 WL 30964 20

Bruton v. United States, 391 U.S. 123 (1968) 12, 13, 18

California v. Green 399 U.S. 149 (1970) 10

Chambers v. Mississippi, 410 U.S. 284 (1973) 12

Crespin v. State of New Mexico, 144 F.3d 641 (10th Cir. 1998) 15

Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987) 21

Douglas v. Alabama, 380 U.S. 415 (1965) 13, 18

Dutton v. Evans, 400 U.S. 74 (1970) 12, 13

Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996) ... 16, 19

Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985) 15

Idaho v. Wright, 497 U.S. 805 (1990) 7, 10, 11

Page

Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) 20

Latine v. Mann, 25 F.3d 1162 (2d Cir. 1994) 16

Lee v. Illinois, 476 U.S. 530 (1986) ..... *passim*

Lilly v. Virginia, __ U.S. __, No. 98-5881, argued March 29, 1999 6

New Mexico v. Earnest, 477 U.S. 648 (1986) 13

Ohio v. Roberts, 448 U.S. 56 (1980) 10

Olson v. Green, 668 F.2d 421 (8th Cir. 1982) 16, 19

State of Oregon v. Nielsen, 853 P.2d 256 (Or. 1993) 16

State of Oregon v. Wilson, 918 P.2d 826 (Or. 1996) 17

United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993) 17

United States v. Coachman, 727 F.2d 1293 (D.C. Cir. 1984) 16

United States v. Flores, 985 F.2d 770 (5th Cir. 1993) 15, 19

Cited Authorities

Page

United States v. Garris, 616 F.2d 626 (2d Cir. 1980) 17

United States v. Harty, 930 F.2d 1257 (7th Cir. 1991) 17

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) 20

United States v. Keltner, 147 F.3d 662 (8th Cir. 1998) 16, 20

United States v. Layton, 720 F.2d 548 (9th Cir. 1983) 17

United States v. Magana-Olvera, 917 F.2d 401 (9th Cir. 1990) 15

United States v. Moses, No. 96-3632, 1998 WL 378812 (3d Cir. July 1998) 16

United States v. Oliver, 626 F.2d 254 (2d Cir. 1980) 16

United States v. Seeley, 892 F.2d 1 (1st Cir. 1989) .. 20

United States v. Taggart, 944 F.2d 837 (11th Cir. 1991) 20

United States v. York, 933 F.2d 1343 (7th Cir. 1991) 20

Cited Authorities

Page

White v. Illinois, 502 U.S. 346 (1992) 10

Williams v. State of Mississippi 667 So.2d 15 (Miss. 1996) 16

Williamson v. United States, 512 U.S. 594 (1994) . 6, 12, 18

Statute:

28 U.S.C. § 1257(a) 1

United States Constitution:

Fifth Amendment 13

Sixth Amendment ..... i, 1, 4, 5, 7, 8, 9

Fourteenth Amendment ..... i, 1, 4, 5, 7, 9

Rules:

Federal Rule of Evidence 804(b)(3) 18

Sup. Ct. R. 10(b) 6, 7

Texas Rules of Criminal Evidence 803(24) 4, 20

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeals For The Fifth District Of Texas At Dallas Dated And Filed June 5, 1998 ..... 1a

Appendix B — Judgment On Jury Verdict Of Guilty Punishment Fixed By Court Or Jury — No Probation Granted Of The Criminal District Court 4 Of Dallas County, Texas Dated June 28, 1996 ..... 14a

Appendix C — Order Of The Court Of Appeals For The Fifth District Of Texas 16a

Appendix D — Official Notice Of The Court Of Criminal Appeals Of Texas Refusing Petition For Discretionary Review Dated January 27, 1999 ... 17a

Appendix E — Constitutional Provisions Involved . 18a

Abdel Mohamed Rahim respectfully petitions the Supreme Court of the United States for Writ of Certiorari to review the judgment of the Court of Appeals, Fifth Supreme Judicial District of Texas rendered and entered in case number 05-96-01069-CR of that Court which affirmed the judgment of the Criminal District Court Number Four of Dallas County, Texas.

OPINION BELOW

A copy of the opinion of the Court of Appeals, Fifth District of Texas is attached as Appendix A. A copy of the judgment on jury verdict of the Criminal District Court 4 of Dallas County is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment giving rise to this petition for a writ of certiorari was rendered on June 5, 1998 (Appendix C). Appellee's motion for rehearing was denied on July 17, 1998. Petition for Discretionary Review to the Court of Criminal Appeals of Texas Refused January 27, 1999 (Appendix D). Jurisdiction is invoked under Title 28, United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution (the "Constitution") are reprinted in full at Appendix E.

STATEMENT OF THE CASE

On December 5, 1994, two men went to Bob's Market in Dallas, Texas at approximately 11:00 p.m. where they lured the owner, Ahmad Hassan (deceased) outside and shot him to death with a pistol. Witnesses identified the two as Mario Cabrera and Adolpho Vivanco. Vivanco and Cabrera were tried separately from Petitioner, Abdel Mohamad Rahim (hereafter Petitioner). During Petitioner's trial, evidence was given by three witnesses that Petitioner had made incriminating statements to them regarding his role in the killing of

the deceased. Petitioner did not testify during the trial, but sought to cast doubt on the statements of the three witnesses during cross-examination by showing bias and motive to falsify.

THE TESTIMONY OF BARRIOS, HARDEMAN, DEJEAN AND VIVANCO

Orlando Barrios testified that he and Petitioner were acquainted because he often shopped at Petitioner's store on Colorado Avenue. R. 3, p. 405. Sometime after the murder of Mr. Hassan, Barrios stopped by Petitioner's store. Petitioner asked Barrios to write a story on a piece of paper to give to Mario Cabrera in jail so that Cabrera would get less time on his murder case. Barrios wrote down a scenario authored by Petitioner to the effect that the murder occurred because of an argument over the theft of a pair of socks by Cabrera from the deceased. The deceased had shamed Cabrera as a thief. R. 4, 11, p. 415. Barrios relayed the story to Cabrera who never commented on it. R. 4, p. 416.

Darrell Darnell Hardaman testified that he was a drug addict who hung around in the neighborhood outside Petitioner's grocery store. R. 4, p. 472. He occasionally did errands for Petitioner who gave Hardaman food and money. Sometime before the murder, Petitioner told Hardaman he wanted the owner of Bob's Market killed. R. 4, p. 473. When Hardaman informed Petitioner that he couldn't do it, Petitioner asked if Hardaman knew anyone who would, offering Hardaman money. R. 4, p. 474. Petitioner told Hardaman that Hassan had lost some merchandise and money belonging to Petitioner. R. 4, p. 474.

Hardaman had seen both Cabrera and Vivanco at Petitioner's store. R. 4, 476. In approximately June of 1995, Petitioner told Hardaman that he had some Mexican guys to do the killing and pointed out Mario Cabrera. R. 4, p. 477. Toward the latter part of 1995, Hardaman met Petitioner in jail where Petitioner told Hardaman that he had beaten law enforcement again, that they had no evidence and that he would soon be back on the street. R. 4, p. 478. He again told Hardaman that he had paid some Mexicans $500 to kill the deceased. R. 4, 481.

John Dejean testified that he befriended Petitioner in the Dallas County Jail. Petitioner told Dejean that he paid Mario Cabrera and Adolpho Vivanco to kill Mr. Hassan. R. 5, 523-525. This conversation was in March of 1995. R. 5, 523.

In May, Dejean had a second conversation with Petitioner, who related the same information. Thereafter, Dejean contacted Detective Clark of the intelligence division of the Dallas Police Department. R. 5, 523-528.

Through Detective Penrod, Dallas Police Department, the statement of Adolpho Vivanco was admitted confessing his participation in the killing and alleging that he had been paid by one of the owners of the Super 7 Store to kill Mr. Hassan. See State's Exhibit 2, R. 5, 551, App. A, 4-5. Detective Penrod testified that after giving the statement, Vivanco was shown a photographic lineup containing pictures of all of the brothers who owned the Super 7 Store on Colorado Avenue. Vivanco picked Petitioner's picture out of the lineup as being the person who hired and paid him to kill Mr. Hassan. R. 5, 582-583. Vivanco's statement was deemed reliable as an exception to the hearsay rule because it was corroborated by other evidence in the case.

Vivanco refused to testify in the matter since his case was on appeal. R. 5, 604. The statement was given to Det. Penrod before police witnesses and was on a "voluntary statement" form which had the appropriate printed warnings at the top. The statement incriminated the declarant, Cabrera and Petitioner.

Vivanco declared that he and Cabrera had made a deal with one of the owners of Petitioner's store a few days before the killing to kill the owner of Bob's Market for money. He further stated that he had accompanied Cabrera to the scene of the crime though it was Cabrera who did the actual shooting. Penrod was permitted to testify over Petitioner's objection that later Vivanco identified Petitioner out of a line-up as the person mentioned in the incriminating statement. Vivanco minimized his own participation as merely being present during the solicitation, killing and payoff. App. A, 4-5.

The statement was then admitted into evidence pursuant to the declaration against penal interest exception of Rule 803(24) Texas Rules of Criminal Evidence. Petitioner's confrontation objections were overruled. Under the prevailing state law as set out in *Bingham v. State*, 913 S.W.2d 208 (Tex. Crim. App. 1995), the Trial Court found that Vivanco's statement was deemed reliable as an exception to the hearsay rule because it was corroborated by other evidence in the case (the Court of Appeals refused to address the issue). Petitioner demonstrated that the declarant, Vivanco, repudiated his own statement during a pretrial hearing in his case where he challenged the admissibility of his own confession. R. 5, 632-47. Therein, Vivanco maintained that the confession was a product of coercion, unkept promises, was involuntary, and was factually untrue. Petitioner was able to show that Vivanco made an earlier confession denying any involvement in the murder. DX-5, R. 5, 616-17.

By not deciding the issue and misapplying the harmless error analysis, the Court of Appeals failed to condemn the Trial Court's finding that declarations against penal interest constitute a firmly rooted exception to the hearsay rule in Texas, the Trial Court held that Petitioner's right to confrontation was not violated by admission of Vivanco's statements to police.

That decision was fundamentally flawed. As noted at the outset, this Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of a custodial confession of an accomplice at the separate trial of a defendant because such statements are inherently unreliable. Moreover, contrary to the views of the Court of Criminal Appeals of Texas, the United States Circuit Courts of Appeal have uniformly concluded that post-arrest statements, made while in custody in response to police interrogation, which incriminate another and peripherally incriminate the declarant, and shift blame to others in an attempt to curry favor, are inadmissible. This is even more true where Petitioner was able to demonstrate that Vivanco had made a prior inconsistent confession and later completely repudiated the statements admitted against Petitioner.

Furthermore, this Court has made clear that the general category of statements against interest is too large for meaningful Confrontation Clause analysis, and that custodial statements by an accomplice that incriminate a criminal defendant do not fall within a recognized hearsay exception. This Court has also made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be evaluated. As a result, there are special and important reasons for this Court to exercise its discretion and grant the petition for a writ of certiorari to prevent the wrongful and unconstitutional incarceration of Mohamed Abdel Rahim.

SUMMARY OF THE ARGUMENT

1. This Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of an accomplice's custodial confession at the criminal trial of a defendant because such statements are inherently unreliable. *See, e.g., Lee v. Illinois*, 476 U.S. 530 (1986). Following this fundamental principle, the United States Circuit Courts of Appeal — confronting post-arrest hearsay statements by an accomplice, made while in custody and in response to police interrogation, which incriminate another and which peripherally incriminate the declarant, but which minimize the declarant's role in the criminal activity and shift blame to others in an attempt to curry favor — have uniformly concluded that such statements are inadmissible under the Confrontation Clause. Notwithstanding these well-established principles, the Fifth Court of Appeals of Texas upheld admission of an unavailable accomplice's statements to police, finding that they fell within a firmly rooted exception to the hearsay rule even though impeached with a prior inconsistent confession and later repudiated by the declarant.

There are special important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Fifth Court of Appeals of Texas' decision in this regard. That decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments, as well as

precedent from every United States Circuit Courts of Appeals confronting similar circumstances. Sup. Ct. R. 10(b). This case is substantially similar to the issues presented to this Court in *Lilly v. Virginia*, __ U.S. __, No. 98-5881, argued March 29, 1999. Petitioner has made liberal use of the able Petition for Certiorari filed by *Lilly*. Like Virginia, the controlling authority in Texas mandates the consideration of the entire record in finding that the statement or declaration against penal interest has been sufficiently corroborated to be reliable. However, unlike *Lilly*, the Texas Court of Appeals evaded deciding the issue, finding instead that any error was harmless.

Certiorari is also warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and life sentence, and the Court erred in failing to recognize the devastation of a co-defendant's confession which bolstered and affirmed Petitioner's statements to two other witnesses.

2. This Court has made clear, in a case involving a confession by an accomplice that incriminated a criminal defendant, that the general category of statements against interest is too large a class for meaningful Confrontation Clause analysis, *Lee v. Illinois*, 476 U.S. 530, 540 n.5 (1986), and that such statements do not fall within any recognized hearsay exception, *Williamson v. United States*, 512 U.S. 594, 601, 604-05 (1994). The Fifth Court of Appeals of Texas nevertheless assumed without deciding that the custodial confession of an accomplice incriminating a criminal defendant was inadmissible but held the confrontation error "harmless".

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Fifth Court of Appeals of Texas's decision in this regard as well. The Court of Criminal Appeals of Texas decision in *Bingham v. State*, 913 S.W.2d 208 (Tex. Crim. App. 1995); on State's Petition for discretionary review, No. 1587-97, January 27, 1999, 1999 WL 30964 (Tex. Crim. App. 1999) is in direct conflict with established precedents

of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided as to whether the hearsay exception for statements against penal interest, as specifically applied to custodial confessions from an accomplice who is unavailable to testify at trial, is a firmly rooted exception to the hearsay rule. Finally, as above, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and sentence.

3. This Court has made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be considered. *Idaho v. Wright*, 497 U.S. 805 (1990). The Trial Court ignored that controlling guidance and expressly and impermissibly based its decision concerning the reliability of the hearsay statements based on other supposed evidence at trial corroborating the hearsay statements.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Fifth Court of Appeals of Texas' decision in this regard as well. By not deciding the issue and misapplying the harmless error analysis, the decision of the Fifth Court of Appeals of Texas is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided in the manner and extent to which they follow the established precedents of this Court, and those decisions conflict with controlling decisions of this Court which prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable accomplice. Finally, as with the prior issues, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission

of unreliable evidence not subject to cross-examination unquestionably substantially contributed to Petitioner's conviction and life sentence. The action of the Court of Appeals and the refusal to review the issues by the Court of Criminal Appeals of Texas under its controlling case, denies Petitioner his right to a meaningful review.

REASONS FOR GRANTING THE WRIT

I.

ADMISSION OF ADOLFO VIVANCO'S POST-ARREST STATEMENTS VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION BECAUSE A POST-ARREST STATEMENT, MADE BY A NON-TESTIFYING ACCOMPLICE IN THE COURSE OF CUSTODIAL INTERROGATION, WHICH INCRIMINATES THE DEFENDANT AND WHICH IS BOTH REPUDIATED AND IMPEACHED, IS INHERENTLY UNRELIABLE AND THEREFORE INADMISSIBLE.

Petitioner's conviction rests squarely on the uncross-examined hearsay statements of Vivanco, statements made under circumstances which this Court has repeatedly held render the statements presumptively unreliable and inadmissible under the Confrontation Clause. Vivanco's statements were made following his arrest, while he was in custody and in response to police questioning. The statements were made after he claimed he was told that he and his friend could go free if he would implicate Petitioner. Those circumstances provided Adolfo Vivanco a strong incentive to shift or spread blame, curry favor, or divert attention to another, which is precisely what he did. Vivanco, throughout the statements, consistently minimized his role in the murder and shifted the blame to Cabrera and Petitioner. Indeed, if Vivanco's statements are credited, he merely happened to be present, not initiating any criminal activity, not holding a gun during the murder, and only sitting in a car outside the store when the money was paid. As this Court and every Court of Appeals confronting similar facts has concluded, Vivanco's statements were made under circumstances that render them inevitably suspect. They

are even more suspect considering the fact that in Vivanco's first confession, he said he saw Cabrera kill the deceased, but had nothing to do with it and he challenged the statement admitted against Petitioner as untrue, coerced and involuntary. Admission of these statements into evidence, without the opportunity for cross-examination, violated Petitioner's right to confrontation under the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. Amend. VI. As this court has observed,

> "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Lee v. Illinois, 476 U.S. 530, 540 (1986) (citation omitted). The right to confront and cross-examine adverse witnesses fulfills this requirement first by "contribut[ing] to the establishment of a system of criminal justice in which the perception of fairness prevails," and "ensuring that convictions will not be based on the charges of unseen and unknown — and hence unchallengeable — individuals." *Lee*, 476 U.S. at 540. Critically, the right to confront and to cross-examine witnesses "promotes reliability in criminal trials." *Id.* As this Court has counseled, confrontation and cross-examination advance the pursuit of truth by

> (1) ensur[ing] that the witness will give his statements under oath–thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forc[ing] the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permit[ting] the jury that is to decide the defendant's fate to observe the

> demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

Id. (quoting *California v. Green* 399 U.S. 149, 158 (1970)) (footnote omitted).

In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court established "a general approach" for determining when statements incriminating a defendant and falling within an exception to the hearsay rule are admissible under the Confrontation Clause and this Court reiterated that general approach in *Idaho v. Wright*:

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate "indicia of reliability." *Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.*

497 U.S. 805, 814-15 (1990) (quoting *Roberts*, 448 U.S. at 65) (emphasis added).

This Court has inferred reliability where the evidence falls within a firmly rooted hearsay exception because those "hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " *Roberts*, 448 U.S. at 66; *see White v. Illinois*, 502 U.S. 346, 355 & n.8 (1992) (stating that the Court has concluded that "firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the Confrontation Clause because such statements "are made in contexts that provide substantial guarantees of their trustworthiness"); *see also Wright*, 497 U.S. at 817 ("[A]dmission under a firmly rooted hearsay exception satisfies the

constitutional requirement of reliability because of the weight accorded longstanding and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.").

Additionally, this Court has made clear that in assessing the particularized guarantees of trustworthiness of a hearsay statement, "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 819. Because statements falling under a firmly rooted hearsay exception are so inherently trustworthy that cross-examination is unnecessary to establish their reliability, and

> [b]ecause evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, [the Court has concluded that] evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability.

Id. at 821 (citation omitted).

Tested by those standards, Vivanco's statements fell far short and should not have been admitted. Their admission violated Petitioner's constitutional rights.

A. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Inherently Unreliable And Its Admission At Trial Violates The Confrontation Clause.

Under well-established case law, uncross-examined hearsay statements like Vivanco's, which are part of a custodial confession by an accomplice that incriminates a defendant, are not admissible under Confrontational Clause analysis. This Court has consistently underscored the inherent and inevitable ***unreliability*** of such hearsay statements inculpating a defendant due to the strong incentive that a person arrested in incriminating circumstances has to shift blame onto others and curry favor with the authorities. Thus, the holding by the

Court of Appeals of Texas affirming the Trial Court's admission of Vivanco's statements was plain constitutional error.

This Court has repeatedly

> recognize[d] that th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . [S]uch a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

Lee, 476 U.S. at 541 (citation omitted); *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting *Lee*); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) (noting the view that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest"); *Bruton v. United States*, 391 U.S. 123, 136 (1968); *see also Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring in part and in judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result) (stating that he "would be prepared to hold as a matter of due process that a confession of an accomplice cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption").

Indeed, the presumption that the custodial statements of a co-defendant or accomplice implicating a defendant are unreliable is so strong that this Court has never countenanced their admission.[1] *See*

1. *Dutton*, which upheld the introduction of the admission without cross-examination of hearsay statements of a non-testifying declarant incriminating (Cont'd)

Lee, 476 U.S. at 544-45; *Bruton*, 391 U.S. at 135-36; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). *See also New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring) (describing presumption as "weighty"). In *Douglas*, this Court reversed a conviction where the prosecutor read to the jury a confession made by the defendant's accomplice. Because the accomplice invoked his Fifth Amendment privilege when called to testify, the Court held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Douglas*, 380 U.S. at 419.

> This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Lee, 476 U.S. at 541.

Similarly, in *Bruton*, this Court reaffirmed its concern with the grave distortion to the truthfinding process resulting from admission of an accomplice's confession implicating a criminal defendant. The Court held that admission of a co-defendant's confession at a joint trial violated the defendant's rights under the Confrontation Clause, notwithstanding the trial judge's instruction to the jury that the confession was admissible only against the co-defendant. The Court concluded that because a confession that incriminates the defendant is so "devastating" and "inevitably suspect," the risk that the jury would not follow instructions was too great to be ignored, underscoring that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 135-36.

(Cont'd)
the defendant, is not to the contrary. In *Dutton*, the hearsay was not "crucial" or "devastating," and, more important, it did not involve a confession made "in the coercive atmosphere of official interrogation" or result in a "wholesale denial of cross examination." 400 U.S. at 87.

This Court in *Lee* reinforced the Constitutional underpinnings of such a result. In *Lee*, this Court stressed

> the time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.

476 U.S. at 546. The Court began its analysis by rejecting the "categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' " *Id.* at 544 n.5. As the Court explained, "That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* Then, the Court determined that the presumption that the co-defendant's confession could not be trusted as to the defendant's participation in the murders had not been rebutted. Specifically, the Court acknowledged the

> reality of the criminal process . . . that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices,

and that

> a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Id. at 544-45.[2]

---

2. Even the dissent in *Lee*, which would have concluded that the hearsay exception for declarations against interest is firmly established, recognized that

(Cont'd)

Thus, this Court has consistently concluded that the statements of an accomplice or co-defendant which are made during custodial interrogation and which incriminate a criminal defendant are inherently unreliable and therefore inadmissible under the Confrontation Clause. This time-honored principle is amply reflected in the decisions of the lower courts. Most Courts of Appeals addressing the issue have concluded that custodial statements like the one at issue in this case are inadmissible under the Confrontation Clause.[3]

(Cont'd)

> accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility — circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest — that we have viewed the accomplice's statements as "inevitably suspect."

Lee, 476 U.S. at 552 (Blackmun, J., dissenting).

3. *See Crespin v. State of New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998) (concluding there was no reason to depart "from time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable" where declarant "may reasonably have thought such a statement would decrease her practical exposure to criminal liability"); *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) (concluding that "there is a[] category of statements against penal interest that should generally be regarded as inadmissible under the Confrontation Clause, particularly where the declarant's unavailability is due simply to invocation of the Fifth Amendment in response to actual or potential prosecution, namely statements accusatory of another taken by law enforcement with a view to prosecution"); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (finding statements were not sufficiently against interest where made while in custody, constituted an attempt to curry favor from authorities and trivialized declarant's role by shifting blame to defendant and therefore could not be admitted under trivialized declarant's role by shifting blame to defendant and therefore could not be admitted under Confrontational Clause); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (concluding admission of statement by co-defendant violated

(Cont'd)

Only a few cases have permitted admission of a statement made while in custody and in response to police interrogation, but none involved a statement like the one at issue in this case which was both repudiated and contradicted by the declarant.[4] And the vast majority of cases allowing admission of a statement inculpating a defendant have not involved statements to police.[5]

(Cont'd)
Sixth Amendment where made in response to custodial interrogation); *United States v. Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (finding admission of accomplice's confession implicating defendant violated Confrontation Clause); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir. 1982) (noting inherent unreliability of custodial statements implicating a third person, and concluding that statements of accomplice to police did not bear sufficient indicia of reliability); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (finding written confession made while in custody "may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to gain favor with the Government in the hope of obtaining release or reduced punishment"). *See also Williams v. State of Mississippi* 667 So.2d 15, 20-21 (Miss. 1996) (noting "post-arrest statements made by one accused pointing the finger at another are as a matter of common experience among the least trustworthy of statements," and finding statement which "completely inculpated the defendant" inadmissible).

4. *See United States v. Keltner*, 147 F.3d 662, 670 (8th Cir. 1998) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) (finding statement had particularized guarantees of trustworthiness where "entire statement inculpated both [defendant] and [declarant] equally" and "neither attempted to shift blame to his co-conspirators nor to curry favor from the police or prosecutor"); *State of Oregon v. Nielsen*, 853 P.2d 256, 263-64, 269-70 (Or. 1993) (finding statement reliable because it "admitted [declarant's] equally culpable involvement, rather than trying to shift blame").

5. *See, e.g., United States v. Moses*, No. 96-3632, 1998 WL 378812, *2 (3d Cir. July 1998) (because statements were made to friend long before arrest, "there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses"); *Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994) (because statement was made to "a perceived ally, not to law enforcement officials," court concluded "it cannot be said that he made

(Cont'd)

Accordingly, the decision of the Fifth Court of Appeals of Texas flatly ignores this Court's Confrontation Clause jurisprudence, as well as that of the Courts of Appeals, which has consistently found custodial statements by an accomplice implicating a criminal defendant inherently unreliable. This Court should grant the petition to review and correct that error.

B. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.

There can be no legitimate question that this Court and others have uniformly rejected admission of statements of an accomplice or co-defendant which are made during custodial interrogation and which implicate a criminal defendant as inherently unreliable and therefore inadmissible under the Confrontation Clause. This Court has done so without formally reaching — or needing to reach — the issue of whether the *general category* of declarations against penal interest is a firmly rooted hearsay exception, describing the *general category* as "too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5. However, the *sub-category* of that general category at issue here — limited to custodial statements by an accomplice inculpating a criminal defendant — involves statements that are inherently unreliable and are not even within a proper hearsay

---

(Cont'd)
the statement in an effort to curry favor or in a coercive atmosphere"); *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993) (statements to informant which did not minimize declarant's culpability); *United States v. Harty*, 930 F.2d 1257, 1264-65 (7th Cir. 1991) (statements to informant made under circumstances where declarant had "strong motivation to recount events accurately"); *United States v. Layton*, 720 F.2d 548, 560 (9th Cir. 1983) ("[Jim] Jones's statements to [his lawyer and trusted advisor] were not made while in custody to curry favor with the police."); *United States v. Garris*, 616 F.2d 626, 632 (2d Cir. 1980) (pre-arrest statement which clearly implicated declarant but did not consistently inculpate defendant); *State of Oregon v. Wilson*, 918 P.2d 826, 837 & n.11 (Or. 1996) (noting that to whom the statement is made is an important factor and that declarant made statements implicating both declarant and defendant to a friend).

exception at all under this Court's case law, much less a firmly rooted exception.

Four years ago, in a case involving the scope of the hearsay exception for statements against penal interest, this Court expressly declined to decide whether the hearsay exception for statements against penal interest is firmly rooted for Confrontation Clause purposes. *Williamson*, 512 U.S. at 605. In so doing, however, this Court made crystal clear that statements of an accomplice which incriminate a defendant are not within the hearsay exception of Rule 804(b)(3) of the Federal Rules of Evidence. Citing its oft-repeated conclusion that custodial post-arrest statements of a co-defendant have traditionally been viewed with special suspicion and considered less credible than ordinary hearsay evidence, the Court concluded that a

> district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Id. at 601. With respect to the particular statements at issue, the Court could not "conclude that all that Harris said was properly admitted." *Id.* at 604. Specifically, the Court concluded that

> parts of [Harris'] confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability. . . .

Id. Because neither the district court nor the Court of Appeals had inquired whether each of the statements in Harris' confessions was truly self-inculpatory, the Court remanded for this assessment to be made. *Id.*

Three Courts of Appeals, expressly following this Court's teachings in *Lee*, *Bruton*, and *Douglas*, have held that the exception for declarations against interest cannot be deemed firmly rooted as applied to statements by an accomplice which incriminate a defendant.

Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996); *United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993); *Olson v. Green*, 668 F.2d 421, 427 & nn.10, 11 (8th Cir. 1982) ("United States supreme Court decisions, as well as decisions from the courts of appeals, indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."). As the Tenth Circuit recently concluded:

> Generally, evidence is presumptively reliable if it comes within a firmly rooted hearsay exception. [The co-defendant's custodial] statement . . . cannot be immunized by the exception for statements against interest. Although it is a statement against penal interest . . . , the Supreme Court has held that in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee v. Illinois*, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 2064 n.5, 90 L. Ed. 2d 514 (1986).

Earnest, 87 F.3d at 1131.[6]

Six other Courts of Appeals, along with the Texas Court of Criminal Appeals, however, have suggested that the *general category* of hearsay exceptions for declarations against penal interest is firmly rooted, and have applied that general exception to a broad category

---

6. The Fifth Circuit in *Flores* further doubted that, from a historical perspective, the exception could fairly be deemed firmly rooted. 985 F.2d at 776 n.13. Noting that the common law did not recognize an exception for statements against penal interest, and that it was not until 1975 that the Federal Rules permitted admission of statements against penal interest, the court concluded that

> [t]he relatively recent recognize of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation in cases of the present kind.

Id. at 778-79.

of statements. *United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998); *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir. 1991); *Jennings v. Maynard*, 946 F.2d 1502, 1505-06 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (concluding that the exception "would seem to be 'firmly rooted' "); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983); *Bingham v. State*, __ S.W.2d __ (Tex. Crim. App. 1999) 1999 WL 30964.

II.

THE TEXAS COURT OF APPEALS USED AN IMPROPER LEGAL STANDARD FOR EVALUATING WHETHER EVIDENCE ERRONEOUSLY ADMITTED WAS HARMLESS ERROR.

The Court of Appeals held that "assuming, without deciding, the admission of the statement and identification was error, we conclude the error was harmless". Appendix P. 5. Reviewing the record as a whole, the Court found that Petitioner's statements to three others constituted "overwhelming" evidence and applied the harmless error rule. Appendix P. 6. The Court recognized that Petitioner had been able to introduce a prior inconsistent confession by Vivanco to the police where he claimed that he was not involved in the shooting. Furthermore, that Petitioner was permitted to read into evidence testimony from Vivanco's own trial where Vivanco recanted his confession. App. A-7.

The opinion of the Court of Appeals assumes that the Trial Court was correct when it looked to the other evidence in the case to corroborate Vivanco's declaration against his own penal interest which was admitted under 803(24) Tex. R. Crim. Ev. and the *Bingham* decision. *Id.* at *3. The Court of Appeals ultimately held that

> we recognize that the State did somewhat emphasize Vivanco's confession in closing. However, it emphasized the confession only insofar as it corroborated the testimony of Navarrow, Barrios and Dejean. We conclude the record as a whole establishes that admission of Vivanco's

statement and identification was harmless beyond a reasonable doubt.

The testimony of Barrios, Hardeman and Dejean show that Petitioner's statements matched Vivanco's confession.

The Texas Court of Appeals, while acknowledging that Petitioner had thoroughly impeached Vivanco's confession with a contradictory confession and a recantation, also noted that the confession was corroborated by Petitioner's statements to State's witnesses Navarrow, Barrios, and Dejean. Petitioner had vigorously sought to discredit the testimony of Darryl Hardeman, Orlando Barrios and John Dejean for each testified that Petitioner had made incriminating statements about his involvement in the killing. The opinion of the Court noted that the statements attributable to Petitioner by these witnesses harmonized with the version given by Vivanco in his written confessions. The Court also opined that since Petitioner had been able to impeach the statement, then any confrontation error was rendered harmless beyond a reasonable doubt. This holding directly conflicts with this Court's opinion in *Cruz v. New York*, 481 U.S. 186, 192, 107 S. Ct. 1714, 1718-19, 95 L. Ed. 2d 162 (1987) holding that where the accused attempts to avoid his own confession at trial on grounds that it was false or never made, the "interlocking" nature of a co-defendant's confession bears a positive relationship to its "devastation".

Admission of the co-defendant's interlocking confession visited "devastation" on Petitioner's defense at the guilt phase of the trial. The error of the admission of these confessions was not harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDGAR A. MASON
Attorney for Petitioner
2612 Boll Street
Dallas, Texas 75204-1002
(214) 720-9050

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS DATED AND FILED JUNE 5, 1998

AFFIRM and Opinion Filed June 5, 1998

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-01069-CR

ABDEL MOHAMED RAHIM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F95-72756-LIK

OPINION

Before Justices Lagarde, Kinkeade, and Chapman
Opinion By Justice Chapman

Appellant appeals his jury conviction for capital murder. The trial court assessed a mandatory life sentence. In eight points of error, appellant generally contends the trial court erred in: (1) admitting the confession of his codefendant, (2) denying his requested accomplice witness charge, (3) admitting evidence of an out-of-court identification, (4) charging the jury in the disjunctive, and (5) overruling his motion for new trial. We affirm.

Appendix A

FACTUAL BACKGROUND

On December 5, 1994, Adolfo Vivanco and Mario Cabrera shot and killed Ahmad Hassan. The murder occurred outside a grocery store owned by the deceased called Bob's Market. Vivanco and Cabrera had lured the deceased out of the store and shot him in the parking lot. At trial, the State introduced evidence that the killing was a murder for hire and, specifically, that appellant paid Vivanco and Cabrera to kill the deceased.

David Alferez testified that he was at Bob's Market on the day of the murder. Just before the murder, Cabrera was talking on a public phone outside of the store. Alferez overheard Cabrera say, "We're getting paid to do this. We've got to kill the owner."

Orlando Barrios testified that he had known appellant for several years. Appellant owned a store called Super Seven. Barrios also knew Vivanco and Cabrera who were in the "Junior Home Boys" gang. After Cabrera was arrested for the murder, appellant spoke with Barrios about how to make the murder look like a regular killing instead of capital murder. Appellant told Barrios to write a story to give Cabrera about how the murder occurred. Appellant said that Cabrera needed to say he killed the deceased over an argument about a pair of socks. Additionally, appellant told Barrios that Vivanco had "snitched."

Darrell Hardman testified that he contacted police because he had information concerning the murder. Hardman was in jail at the time, but was not offered anything for

cooperating with the police. Hardman stated that prior to the murder, appellant told him he wanted the owner of Bob's Market killed and offered Hardman money to do it. Appellant wanted the victim killed because he had "messed him out" of some money. Hardman knew that Vivanco and Cabrera often hung around appellant's store. In June 1995, appellant told Hardman that he had paid some Mexican guys $500 to kill the owner of Bob's Market.

Hardman saw appellant in jail after appellant's arrest. Appellant said the had "beat the mother fuckers again — they did not have any evidence on him." Hardman admitted having several prior convictions for burglary and theft, but had no pending cases at the time of trial.

John de Jean testified that in January 1996, while in jail, he met appellant. He spoke to appellant at various times about various subjects. In the spring of 1996, they talked about the murder at Bob's Market. Appellant told de Jean that Cabrera and Vivanco were involved in the murder and asked de Jean if he could find out if they were in the county jail. Appellant said he wanted to know because they were supposed to testify at his murder trial. A few day later, appellant told de Jean that he paid Vivanco and Cabrera $500 each to kill the owner of Bob's Market. Appellant laughed about it and said he was not worried because there were no witnesses when he paid them. Shortly thereafter, de Jean contacted the police to tell them about appellant's statements.

De Jean admitted having several prior convictions for felony theft, forgery, and mail fraud. He further admitted having a pending felony forgery charge. Neither the

prosecutor or the police had promised him anything for his testimony, and he expected nothing in return for his testimony.

The State offered the written statement of Adolfo Vivanco through the testimony of Detective Kenneth Penrod. Penrod stated that he arrested Vivanco in March 1995. On March 12, 1995, Vivanco made a statement to police. The statement was admitted over appellant's hearsay and confrontation clause objections. The statement is as follows:

> A few days before we killed the owner of Bob's Market, I don't remember how many days, me and Mario Cabrera went to the Super Seven Store and talked to one of the owners. I don't know the owner's name. He told us he would pay us $500.00 each to kill the owner of Bob's Market. He didn't tell us why he wanted it done. We said we would do it. He told us he would pay us after we did it. A few days later me and Mario walked up to the store. I had the gun in a paper sack and he grabbed it from my hand. It was a five-shot revolver. When we got to the store we stopped out front by the phones. I talked to my girlfriend. We waited, but the owner did not come out. Mario decided to go in and tell the owner that someone was vandalizing his van. That's when I started walking toward the alley. I heard five shots. I turned around and saw Mario running toward me. We saw Chino at the store in his white car when we were walking to the store. We told him to wait for us over on Madison, but we went straight to my apartment.

> Me and Mario went up to the Super Seven on Colorado the next day to get our money. Mario told me to wait outside. Mario went in and got the money. He came out and gave me my $500.00 and kept his $500.00. It was in 20's. I tried to find out the owner's name who paid us because Navarro asked me to. They just told me not to worry about it because all Mario would get was five years.

Penrod further testified that he showed Vivanco a photographic line-up to see if he could identify the person that offered him money to kill the deceased. Vivanco identified appellant.

Introduction of Vivanco's Out-of-Court Statement and Identification

In points of error, one, two, four, five, and six, appellant contends the trial court erred in overruling his objection to Vivanco's confession and permitting Penrod to testify that Vivanco identified appellant as the person that offered him money to kill the owner of Bob's Market. He complains generally that the admission of Vivanco's statements violated the confrontation clause and was inadmissible hearsay.

Assuming, without deciding, admission of the statement and identification was error, we conclude the error was harmless. Because appellant's complaints concern constitutional error, we must reverse unless we can say beyond a reasonable doubt that the error did not contribute to the conviction or the punishment assessed. Tex. R. App. P. 44.2(a); *Harrington v. California*, 395 U.S. 250, 254 (1969).

We must isolate the error and all its effects, then ask whether a rational trier of fact might have reached a different result if the error and its effects had not occurred. *See Harris v. State*, 790 S.W.2d 568, 588 (Tex. Crim. App. 1989). In making this determination, we consider: (1) the source of the error; (2) the nature of the error; (3) whether or to what extent it was emphasized by the State; (4) the probable collateral implications of the error; and (5) whether declaring the error harmless would encourage the State to repeat it with impunity. *Id.* at 587. We do not focus on the propriety of the outcome of the trial, but on the integrity of the process that led to conviction and punishment. *Id.* Overwhelming evidence of guilt, while not determinative, is a factor that can be considered. *See Denton v. State*, 920 S.W.2d 311, 312-13 (Tex. Crim. App. 1996).

We conclude, reviewing the record as a whole, admission of Vivanco's out-of-court statements was harmless beyond a reasonable doubt. David Alferez, who was present at Bob's Market at the time of the shooting, overheard Cabrera saying that he was getting paid to kill the owner of Bob's Market. Appellant told Orlando Barrios that he was devising a story for Cabrera to tell police so that it would not appear as though it was a murder for hire. Moreover, appellant told Barrios that Vivanco had "snitched." Thus, there was other evidence that Vivanco had confessed and implicated appellant. Furthermore, appellant told Darrell Hardman that he had paid "some Mexicans" to kill the owner of Bob's Market: Appellant also told John de Jean that he paid Vivanco and Cabrera $500 each to kill the owner of Bob's Market.

Appendix A

Although appellant was not permitted to cross-examine Vivanco as to the substance of the statement, appellant was able to introduce a prior inconsistent statement made by Vivanco to police. Specifically, appellant offered a statement in which Vivanco claimed he was not involved in the shooting. Furthermore, appellant was permitted to read Vivanco's testimony from Vivanco's own trial into evidence where Vivanco effectively recanted his confession. Vivanco testified that after he was arrested, Penrod questioned him about the murder. Vivanco told Penrod that he had already told police everything he knew in his prior statement. Vivanco claimed that Penrod told him he wanted Vivanco to finger appellant and, if he did, Vivanco could get out of jail. Vivanco was exhausted when he signed the confession, which Penrod wrote, and cannot remember signing the confession or whether Penrod read the confession to him. He only signed the statement so that Penrod would leave him alone. Appellant was thus able to present the jury with evidence to impeach Vivanco even though Vivanco did not testify at appellant's trial and was not subject to cross-examination.

We recognize that the State did somewhat emphasize Vivanco's confession in closing. However, it emphasized the confession only in so far as it corroborated the testimony of Navarro, Barrios, and de Jean. We conclude the record as a whole establishes that admission of Vivanco's statement and identification was harmless beyond a reasonable doubt. We overrule appellant's first, second, fourth, fifth, and sixth points of error.

Appendix A

ACCOMPLICE WITNESS CHARGE

In his third point of error, appellant contends the trial court erred in denying his requested accomplice witness charge. Appellant asserts that Vivanco's confession constituted testimony of an accomplice witness and, therefore, that the trial court was required to give the jury a charge on accomplice witness testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). In *Bingham v. State*, 913 S.W.2d 208, 213 (Tex. Crim. App. 1995) (op. on reh'g), the court of criminal appeals held that no accomplice witness charge is necessary when the statement of a nontestifying accomplice is introduced into evidence. *See id.* Therefore, the trial court did not err in refusing appellant's requested charge. We overrule appellant's third point of error.

DISJUNCTIVE CHARGE

In his seventh point of error, appellant contends the trial court erred in charging the jury in the disjunctive that it could convict if it found that the deceased employed "Mario Cabrera, Tony Ramos or Adolfo Vivanco" to kill the deceased. He complains that because the indictment charged in the conjunctive, the State was required to prove that appellant employed all three men to kill the deceased. We disagree. It is well established that the indictment can allege in the conjunctive and the jury can be charged in the disjunctive. *See White v. State*, 890 S.W.2d 69, 72 (Tex. Crim. App. 1994); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 958 (1992). We perceive no error. We overrule appellant's seventh point of error.

Appendix A

DISMISSAL OF INDICTMENT

In his eighth point of error, appellant contends the trial court erred in overruling his motion for new trial. Prior to trial, appellant filed a motion to dismiss the indictment claiming that the State had violated his sixth amendment right to counsel because the State used appellant's private investigator to investigate a collateral solicitation to commit capital murder case against appellant. The trial court held a hearing on the motion to dismiss. However, because a key witness could not appear, the trial court continued the hearing until after trial, treating the motion as a motion in arrest of judgment. In a post-trial hearing, the trial court heard additional evidence on the issue presented in the motion to dismiss the indictment. The evidence presented is as follows.

David Wells testified that he was employed by appellant's attorney to work as an investigator in the instant capital murder case. While working on the case, appellant told Wells that he wanted Michael Aziz killed and offered Wells money if he would do the job. Wells contacted a friend, Gregory Baker, an FBI special agent, to ask his advice as to what he should do.

Baker told Wells that he should wear a wire the next time he spoke to appellant and attempt to get evidence on the solicitation charge. Wells agreed to do so and taped several conversations between appellant and himself concerning the solicitation case.

Baker told Wells that he did not want to hear anything about the instant case and that it had no relevance to the

solicitation case. Consequently, Wells did not discuss the instant case with Baker. Wells, however, acknowledged that on the tapes, there was some discussion of the instant case. These tapes were ultimately obtained by the district attorney's office after the FBI decided that the solicitation case should be filed in State court. Although Wells spoke with an assistant district attorney about the solicitation case, the assistant district attorney did not want to know anything about the instant case. Wells testified that the prosecutor never asked him about witnesses, defensive theories, or anything else about this case. Wells was formally removed as appellant's investigator after appellant's arrest for solicitation and appellant's attorney learned of Wells's actions.

Gregory Baker testified confirming Wells's testimony. Baker said that after Wells approached him about the solicitation offense, they decided to obtain evidence against appellant by wiring Wells.

Baker was aware that Wells was working for appellant's attorney and he, therefore, had some concerns about Wells's conflict. Consequently, Baker asked an Assistant U.S. Attorney whether Wells's investigation of the solicitation offense would violate appellant's sixth amendment rights. The Assistant U.S. Attorney told Baker there would not be a problem as long as he was not attempting to get information in the pending case.

Baker made clear to Wells he was not interested in the instant capital murder case and they never discussed this case. Baker instructed Wells that if appellant spoke of the instant case while he was wired to attempt to change the subject.

Appendix A

Baker met with the assistant district attorney to tell him generally of the situation. Baker did not initially give the district attorney any details about the solicitation offense. Eventually, however, Baker gave the tapes to the district attorney's office through the Dallas Police Department because the FBI decided the solicitation case should be filed in State court.

The prosecutor in the instant case testified that he learned that there was an FBI investigation concerning appellant about three weeks before appellant was arrested for the solicitation offense. At that time, FBI special agent Baker told the prosecutor that he was investigating a case against appellant, but Baker did not tell the prosecutor what the offense was or who he was working with in the investigation. After appellant was arrested, the prosecutor learned that appellant was arrested for solicitation to commit capital murder and that David Wells was helping the FBI.

Appellant asserts that Wells was acting as a government agent and that his actions in taping his conversations and working with the FBI violated his right to counsel and due process. He further asserts that he is entitled to dismissal of the indictment because the tapes were turned over to the district attorney's office and the tapes disclosed the strategy of his defense and aided the prosecution in its presentation of its case against him.

Assuming that the State's actions show a violation of appellant's constitutional rights, we nevertheless conclude appellant has not established that he is entitled to the relief requested, dismissal of the indictment with prejudice.

A trial court, by dismissing an indictment with prejudice, is in effect instructing the prosecutor not to proceed with future charges arising from the same offense. *Gaitan v. State*, 905 S.W.2d 703, 705 (Tex. App. — Houston [14th Dist.] 1995, pet. ref'd). A trial court may not dismiss an indictment with prejudice without the prosecutor's consent except in certain circumstances where the court is authorized by constitution, statute, or common law. *State v. Johnson*, 823 S.W.2d 609, 612 (Tex. Crim. App. 1991). One such circumstance, authorized by the sixth amendment to the United States Constitution, is prosecutorial misconduct which prejudicially violates a defendant's right to counsel, where the exclusion of improperly obtained evidence will not cure the prejudice. *State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995); *Gaitan*, 905 S.W.2d at 705. Under *Frye*, the trial court must first determine whether appellant's sixth amendment right to counsel was violated and then determine whether dismissal of the indictment with prejudice is warranted. *Frye*, 897 S.W.2d 327-30.

Dismissal of an indictment with prejudice is an extraordinary and drastic remedy. *Gaitan*, 905 S.W.2d at 705. The remedy is warranted only if a defendant suffers demonstrable prejudice or a substantial threat thereof, and where the trial court is unable to identify and neutralize the taint of the transgression by other means. *Fry*, 897 S.W.2d at 330; *Gaitan*, 905 S.W.2d at 705. Whether such prejudice is shown is a question of fact left to the trial court's discretion. *See Frye*, 897 S.W.2d at 331.

We have reviewed the record and conclude the trial court could have found appellant failed to demonstrate prejudice.

Thus, the trial court did not err in refusing to dismiss the indictment.

We begin by noting that Wells was an agent of the federal government, not the State. Neither the district attorney nor any other State agency was involved in Wells's discussions with appellant concerning the solicitation case. Thus, we perceive no prosecutorial misconduct. The district attorney did, however, come into possession of the tapes which Wells made under the direction of the FBI.

We have reviewed a transcription of the tapes. Although the tapes contain various references to the instant case, the tapes focus almost exclusively on the solicitation case. Indeed, whenever appellant attempted to speak of the instant case, Wells tried to get him off that subject. The references that are on the tapes are vague and cryptic. The trial court was within its discretion in concluding appellant's defense in the instant case was not prejudiced by Wells's investigation of a collateral crime. We conclude the trial court did not err in refusing to dismiss the indictment. We overrule appellant's eighth point of error and affirm the trial court's judgment.

s/ Ron Chapman
RON CHAPMAN
JUSTICE

APPENDIX B — JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY COURT OR JURY — NO PROBATION GRANTED OF THE CRIMINAL DISTRICT COURT 4 OF DALLAS COUNTY, TEXAS DATED JUNE 28, 1996

NO. F-9572756-LIK

IN THE CRIMINAL DISTRICT
COURT 4 OF
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS.

ABDEL MOHANAD RAHIM

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY —
NO PROBATION GRANTED

APRIL TERM, A.D., 1996

JUDGE PRESIDING: JOHN C. CREUZOT
DATE OF JUDGMENT: 06/28/96

ATTORNEY FOR STATE: T D'AMORE
ATTORNEY FOR DEFENDANT: EDGAR MASON

OFFENSE CONVICTED OF: CAPITAL MURDER
DEGREE: A CAPITAL FELONY
DATE OFFENSE COMMITTED: 12/05/94

Appendix B

CHARGING INSTRUMENT: INDICTMENT
PLEA: NOT GUILTY

JURY VERDICT: GUILTY
FOREMAN: VICTORIA C. HENDERSON

PLEA TO ENHANCEMENT PARAGRAPH(S): N/A
FINDINGS ON ENHANCEMENT: N/A

FINDINGS ON DEADLY WEAPON, BIAS OR PREJUDICE, AND/OR FAMILY VIOLENCE: NO FINDING

PUNISHMENT ASSESSED BY: COURT

DATE SENTENCE IMPOSED: 06/28/96
COSTS: YES

PUNISHMENT AND PLACE OF CONFINEMENT: LIFE CONFINEMENT IN THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND A FINE OF – 0 –
DATE TO COMMENCE: 06/28/96

TIME CREDITED: 032095 – 4/6/95; 11/18/95 – 6/28/96
RESTITUTION/PREPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

APPENDIX C — ORDER OF THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

AT DALLAS REFUSING PETITION FOR DISCRETIONARY REVIEW DATED JULY 17, 1998

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-01069-CR

ABDEL MOHAMED RAHIM, Appellant

V.

THE STATE OF TEXAS, Appellee

ORDER

Before Justices Lagarde, Kinkeade and Chapman

We **DENY** appellant's motion for rehearing.

s/ Ron Chapman
RON CHAPMAN
JUSTICE

APPENDIX D — OFFICIAL NOTICE OF THE COURT OF CRIMINAL APPEALS OF TEXAS REFUSING PETITION FOR DISCRETIONARY REVIEW DATED JANUARY 27, 1999

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

EDGAR A. MASON
2612 BELL STREET
DALLAS, TX 75204

January 27, 1999
COA#: 05-96-01069-CR
RE: Case No. 1422-98
STYLE: RAHIM, ABDEL MOHAMAD

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

APPENDIX E — CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.